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August 26, 1996

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:

Telephone Number Portability

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)
)

CC Docket No. ~~96-115~~

95-115

Dear Mr. Caton:

Enclosed are an original and eleven copies of the Petition for Reconsideration of Cincinnati Bell Telephone Company in the above referenced proceeding. A duplicate original copy of this letter and attached Petition is also provided. Please date stamp this as acknowledgment of its receipt and return it. Questions regarding this Petition may be directed to Ms. Patricia Rupich at the above address or by telephone on (513) 397-6671.

Sincerely,

David L. Meier

David L. Meier

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION AUG 26 1996
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
) CC Docket No. 95-116
Telephone Number Portability) RM 8535
)

PETITION FOR RECONSIDERATION

Cincinnati Bell Telephone Company ("CBT"), pursuant to Section 1.106 of the Commission's Rules,¹ hereby requests the Commission to reconsider its First Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding (hereinafter, the "Report and Order")² to the extent that decision requires local exchange carriers ("LECs") to provide interim number portability using RCF and DID at rates that are below the LECs' costs. As shown herein, the Commission's decision relative to the recovery of costs associated with interim number portability improperly deprives CBT of just compensation for the services mandated by the Report and Order and, thus, results in an unlawful taking of CBT's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

¹ 47 C.F.R. § 1.106.

² See, In the Matter of Telephone Number Portability, CC Docket No. 95-116, RM 8535, First Report and Order and Further Notice of Proposed Rulemaking, (FCC 96-286), released July 2, 1996 and published in the Federal Register on July 25, 1996.

I. The Commission's Cost Recovery Guidelines

The Report and Order, among other things, requires that currently available number portability measures (i.e., RCF, DID, or other comparable arrangements) be provided until a long-term number portability method is technically feasible and available.³ However, the cost recovery guidelines set forth in the Report and Order fail to ensure that the carriers who are required to implement this mandate will be adequately compensated. Indeed, the cost recovery guidelines adopted in the Report and Order virtually guarantee that adequate compensation will not be provided.

In the Report and Order, the Commission concluded that in order to be "competitively neutral" the cost recovery mechanism should satisfy two criteria.⁴ First, the cost recovery mechanism should not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber. And second, the cost recovery mechanism should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment.

In interpreting the first criterion, the Commission concluded that ". . . a cost recovery mechanism that imposes the entire incremental cost of currently available number portability on a facilities-based new entrant would violate this criterion."⁵ In reaching this conclusion, the Commission clearly acknowledged that it was departing from normal principles of cost causation, under which purchasers of a service are generally required to pay at least the incremental cost

³ Report and Order at para. 111.

⁴ Report and Order at para. 132.

⁵ Report and Order at para. 134.

incurred in providing that service.⁶ Under the Commission's cost recovery guidelines, CBT would be required to offer interim number portability using RCF and DID at rates "close to zero."⁷ Yet CBT estimates that a rate close to zero would not permit full recovery of the costs associated with providing this service. To the extent the Commission's cost recovery guidelines do not permit CBT to recover its costs in their entirety, CBT submits that the guidelines result in an unlawful taking.

II. The Commission's Cost Recovery Guidelines Result In An Unlawful Taking

In determining whether a taking has occurred, courts have undertaken a varied and ad hoc factual inquiry focused upon several significant factors:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [citation omitted] So, too, is the character of the governmental action.

Penn. Central Transportation Co., 438 U.S. at 124. Through its Report and Order, the Commission is imposing requirements on the use of property owned by LECs which serve to benefit competing new entrants in the market for local exchange service. Clearly, such requirements will have a significant economic impact on LECs, such as CBT, and will interfere with the interests of investors who have invested capital in the LECs expecting a return from the use of the LECs' assets.

⁶ Report and Order at para. 131.

⁷ Report and Order at para. 133.

Where a regulator, such as the Commission, imposes requirements on the use of the property of a public utility for a public purpose, the utility must be provided compensation for the use of that property that is just and reasonable. If such compensation is not provided within the regulatory scheme adopted by the regulator, then the utility property has been "taken" in violation of the Fifth and Fourteenth Amendments of the United States Constitution. *Id.* at 308. *See also, FPC v. Texaco, Inc.* (1974), 417 U.S. 380, 391-392; *FPC v. Hope Natural Gas Co.* (1944), 320 U.S. 591; *FPC v. Natural Gas Pipeline Co.* (1942), 315 U.S. 575.

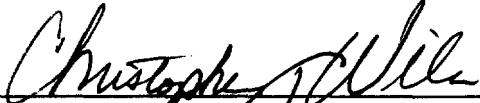
Therefore, to the extent that the Commission, through its Report and Order, imposes regulatory requirements on the use of LEC property, the Commission must also ensure that LECs receive just and reasonable compensation for the use of that property. The Commission's cost recovery guidelines for interim number portability fail to provide for such just and reasonable compensation and, thus, result in an unlawful taking. CBT's basic constitutional rights may not be violated in the Commission's quest to implement the provisions of the Telecommunications Act of 1996.

III. Conclusion

If the Commission deems it appropriate for LECs to implement interim number portability, then the Commission must explicitly outline a mechanism by which LECs can recover their costs. As CBT recommended in its August 16, 1996 comments in this proceeding relative to cost recovery for long-term number portability, this could be accomplished on a competitively neutral basis via a mandatory end user surcharge applied to all local exchange customers. Such a cost recovery mechanism should also apply to interim number portability.

However, if the Commission chooses not to allow recovery of these costs through an end user surcharge, then the Commission must, at a minimum, permit CBT to bill new entrants the entire cost of providing interim number portability.

Respectfully submitted,



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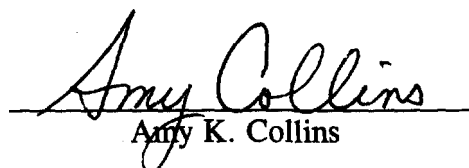
Attorneys for Cincinnati Bell
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Dated: August 26, 1996

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Petition for Reconsideration of Cincinnati Bell Telephone Company** have been delivered by first class United States Mail, postage prepaid, on August 26, 1996, to the persons on the attached service list.


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